PACIFIC TELESIS

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February 24, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: *CC Docket No. 97-11 - Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*

On behalf of Pacific Telesis Group, please find enclosed an original and six copies of its "Comments" in the above proceeding.

An electronic version of this filing as been submitted directly to the Secretary, Network Services Division, Common Carrier Bureau.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Denice Harris

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Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996	CC Docket No. 97-11

PACIFIC TELESIS GROUP'S COMMENTS

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Date: February 24, 1997

TABLE OF CONTENTS

Page

SUMMARY

In these Comments we support: 1) defining an extension as a line that allows a carrier to expand its service into any geographic territory that it is eligible to serve but that its network does not currently reach; we urge the Commission to broaden the definition of "extension" to include an increase in network capability. 2) forbearing from exercising §214 authority over "new" lines with respect to price cap carriers, average schedule carriers, and domestic, non-dominant carriers. 3) streamlining the §214 discontinuance process.

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PACIFIC TELESIS GROUP'S COMMENTS

I. Introduction

Pacific Telesis Group ("Pacific") submits its comments on the Notice of Proposed Rulemaking in this proceeding.[1] This rulemaking will implement Section 402(b)(2)(A) of the 1996 Act[2] which exempts common carriers from obtaining Commission approval "for the extension of any line."

II. Eliminating Unnecessary Regulatory Approval Before Carriers May Provide Services Supports The Pro-Competitive, Deregulatory Goals Of The 1996 Act

Section 214 generally requires that carriers obtain Commission approval prior to constructing, acquiring, operating or transmitting over any line or extension thereof. Prior regulatory approval is intended to prevent carriers from unnecessarily duplicating facilities at the

[1] *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, CC Docket No. 97-11, *Notice of Proposed Rulemaking*, released January 13, 1997 ("NPRM").

[2] Telecommunications Act of 1996, Publ. L. No. 104-104, 110 Stat. 56 ("1996 Act").

expense of captive ratepayers. Congress, however, has exempted this requirement where it was not in the public interest.[3] In the 1996 Act, Congress provided an exemption for "the extension of any line."[4] The 1996 Act, however, did not define "extension" and that is the objective of this rulemaking.

The Commission should define "extension" so as to further Congress' intent to "establish a pro-competitive, deregulatory national policy framework...."[5] Our experiences with the §214 approval process indeed support the Commission's concern that regulation can be a barrier to competition. Unlike the BOCs, competitors generally are not required to obtain prior Commission approval. That alone gives competitors unfair advantage. By being required to file a §214 application, carriers give competitors notice of new facilities or services. The §214 application provides detailed, competitively useful information that competitors can use to develop their counteroffensives. Competitors have the immediate advantage of a headstart while carriers go through time-consuming regulatory processes.

The prior authorization process disadvantages consumers as well. Requiring prior facilities approval delays service introduction. Records of proceedings are peppered with examples of competitors gaming the approval process to delay the delivery of competitive

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[3] Preexisting exemptions were not modified by §402(b)(2)(A). Exemptions exist for a line within a single state that is not part of an interstate line; for local, branch or terminal lines not exceeding ten miles in length; for interstate or foreign communications subject to regulation by state or local government; for interconnection of two or more existing channels or lines; and for the installation, replacement or other changes in plant, operation or equipment, other than new construction, which will not impair the adequacy or quality of service provided. 47 U.S.C. §214.

[4] Section 402(b)(2)(A) states: "The Commission shall permit any common carrier to be exempt from the requirements of section 214 of the Communications Act of 1934 for the extension of any line...."

[5] NPRM, para. 2 quoting 1996 Act Conference Report.

services. The prior approval process takes up Commission and carrier resources that are better spent serving consumers or promoting competition.

These drawbacks are particularly intolerable when there is no countervailing public benefit. This is the case for price cap carriers and nondominant carriers. Regulatory scrutiny of these carriers' capital investments is not necessary to protect ratepayers. The Commission should eliminate the §214 prior approval requirement when it serves to protect only competitors and not ratepayers.

A. The Commission's Proposed Definition Is A Good Start

The Commission proposes to define an "extension" as a line that allows the carrier to expand its service into a geographic territory that it is eligible to serve but that its network does not currently reach. NPRM, paras. 3, 21. Defining "extension" in geographical terms is an appropriate beginning. Congress' intent to prevent unnecessary duplicate facilities is least likely to be undermined when a carrier moves into previously unserved territory. A carrier is unlikely to develop unnecessary facilities as it begins to offer services. Eliminating the prior approval requirement for new facilities in previously unreached territory will reduce an unnecessary barrier to entry, and appropriately eliminate unnecessary regulatory oversight.

We support the Commission's interpretation of the "geographic territory that a carrier is eligible to serve." The Commission states that carriers are currently eligible to serve all United States territory with local exchange telephone service (subject to proper state authorization) and interstate, out-of-region, interLATA service. NPRM, para. 25. Carriers will be eligible to provide interLATA service in-region once they meet the requirements of

Sections 271 and 272 of the 1996 Act. NPRM, para. 25. For international territory, however, carriers are eligible to serve only those countries and international points for which they have received specific §214 authorization. NPRM, paras. 25, n.39; 31-34.

The Commission asks if the definition of extension should apply to all common carriers, including resellers. NPRM, para. 25. Since the prior authorization requirement concerns facilities, all facility-based carriers should be similarly regulated. Resellers, however, are not facilities-based carriers. The Commission has not required resellers to obtain §214 certification in the past.[6] Thus, whether there they are subject to an exemption for an extension is of no consequence.

B. The Commission Should Broaden the Definition of Extension Beyond Mere Geographical Terms

The NPRM proposes to treat increases in the capabilities of an existing network within the area that a carrier already serves as "new lines". NPRM, para. 21. The 1996 Act did not change the requirement for prior approval of new lines. The Commission should not adopt this interpretation.

Increases in network capability should qualify as extensions and should be exempt from §214 requirements. The Commission should not limit its interpretation of "extension" only

[6] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, *Second Report and Order*, 91 FCC 2d 59, para. 29 (1982) (Commission decided to forbear from requiring tariffs or facilities applications from terrestrial resellers); *Fourth Report and Order*, 95 FCC2d 554, para. 35 (1983) (Commission determined that it would treat with forbearance all resellers, including the domestic satellite resellers, resellers owned by or affiliated with exchange telephone companies and domestic record carrier resellers not covered by the interconnection requirements of the Record Carrier Competition Act).

to considerations of geography or space. An extension, according to Webster's, NPRM, para. 7, is "an extension in scope or operation" as well as "a property whereby something occupies space; or an increase in length of time."[7] Increasing the capability of a network, even if doing so increases network capacity at the same time, does not raise the risk of duplicative facilities that warrants prior regulatory scrutiny. Increases in network capability will be additive, not duplicative. Eliminating a prior authorization requirement for increases in capability would be consistent with Congress' pro-competitive, deregulatory framework. Improvements to facilities will stimulate the market, benefiting consumers and competition.

Alternatively, the Commission should treat capability increases or upgrades as "improvements" as it suggests. NPRM, para. 22. This would be consistent with the §214 proviso which does not require prior authorization "for any installation, replacement or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided."[8] The Communications Act also requires the Commission to encourage the provision of new technology and services to the public.[9] The Commission is also required "to make available, so far as possible a rapid and worldwide wire and radio communications service to all the people of the United States a rapid, efficient, Nation-wide...wire and radio communications service...."[10] This statutory language means that available

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[7] Webster's Ninth New Collegiate Dictionary, Merriam-Webster, Inc., Springfield, Mass. (1984).

[8] 47 U.S.C. §214.

[9] 47 U.S.C. §§157, 218.

[10] 47 U.S.C. §151.

and reasonable new technology must be applied in achieving the mandated goal.[11] Defining increases in network capability as extensions will encourage the development and disbursement of new technology. On the other hand, unnecessary regulatory processes will deter the evolution and application of technology. Broadening the definition of extension in this fashion does not eliminate the Commission's ability to protect ratepayers and regulate rates. If the Commission finds that specific rate-affecting network improvements are unnecessarily duplicative, it has the authority to exclude those costs from ratemaking.

Interpreting an increase in network capability as either an extension or an improvement does not offend the Communications Act. Section 214 defines a "line" as a channel of communication but §214 does not say whether a line is a "new" line, which requires prior authorization, or an extension, which does not. Technological innovations offer new ways to establish channels of communications but the channels are not necessarily "new" lines of communications. They could be replacements or upgrades of existing channels, and exempt from §214 prior approval requirements.

The Commission should not adopt the options proposed in the NPRM for the definition of an extension. NPRM, para. 35. The alternatives do not improve the definition of extension as facilities servicing previously unserved territory. For example, the first alternative suggests that a new line would include any line which crosses a state boundary but exclude any line wholly within the state even if that line forms part of an interstate channel of communication. Tying the definition of an extension solely to the placement of a line within a political unit does not seem to have much to do with preventing unnecessary duplication.

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[11] *U.S. v. Western Elec. Co., Inc.*, 531 F. Supp. 894 (D.N.J. 1981).

Whether a new line crosses a state boundary or stays within a state is not a decisive factor in determining if the line is unnecessarily duplicative and warrants regulatory scrutiny because of its ratemaking implications. On the other hand, defining an extension in terms of providing facilities in previously unserved territory is logically related to the concern for unnecessary duplicative facilities. The Commission should reject adopting any alternative definitions.

III. The Commission Should Forbear From Applying §214 Requirements To Carriers Who Do Not Have Incentives To Overinvest In Facilities

The Commission proposes to forbear from requiring §214 authorization for price cap carriers, average schedule companies, and all domestic, non-dominant local or long distance service carriers for "new" lines. NPRM, paras. 29, 37. If the Commission grants forbearance, these carriers will be able to construct, acquire or operate new lines without obtaining prior §214 authorization.[12]

A. The Commission's Proposal Satisfies the Three-Prong Test for Forbearance

Congress has directed the Commission to forbear from enforcing a regulation when the §10(a) three-prong test is met.[13] We agree with the Commission's analysis of each

[12] We agree with the Commission's proposal to repeal §63.07 of its rules which would no longer be necessary. NPRM, para. 38.

[13] Section 10 of the 1996 Act (Forbearance) is codified as Section 160(a) of the Communications Act.

prong. Eliminating §214 requirements for carriers that do not have incentives to overinvest in facilities is consistent with Congress' intent to reduce unnecessary regulation.[14]

The first prong of the §10(a) forbearance test requires that the regulation is not necessary to assure that charges are just, reasonable and not unreasonably discriminatory. Section 214 is meant to guard against carriers including unnecessary facility costs in rates. But that can no longer happen with price cap regulation whether a carrier has adopted a sharing or no-sharing price cap plan. New investment is not included in rates unless a carrier obtains specific Commission approval. Thus, price cap regulation constrains a carrier's ability to raise rates. Similarly, competition constrains non-dominant domestic carriers from recovering the cost of unnecessary facilities from telephone service ratepayers. As the Commission recognizes "Section 214 regulation of such carriers for these purposes will not serve the intent of Section 214". NPRM, para. 25, n.44. Moreover, §214 does not regulate practices, classifications

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[14] We also support forbearance from enforcing §214 approval requirements for small projects, defined as projects in the aggregate that have no more than $12M in annual cost or $3,000 in annual rent or which increase the total book value of a carrier's lines by not more than 10%. Given the size and economic level of "small projects", the extent of regulatory scrutiny for §214 authorization is unnecessary. Forbearing from enforcing §214 requirements for small projects meets the three-prong test. Similarly, the Commission should eliminate unnecessary reports consistent with its other efforts to eliminate unnecessary reports. The Commission has eliminated, for example, divestiture related reports, and CPE reports (on installation and maintenance, sales agency and vendor support program). *Revision of Filing Requirements and Implementation of Section 402(b)(2)(B) of the Telecommunications Act of 1996: Annual ARMIS Reports*, CC Docket No. 96-23, *Notice of Proposed Rulemaking,* 11 FCC Rcd 14110 (1996); *Order*, DA 96-381, released March 20, 1996; *See also Public Notice, Common Carrier Bureau Solicits Comments on Elimination of Divestiture Reports,* Report No. CC 95-34, June 14, 1995 (inquiring into eliminating inter alia the Condition 11 Report.) and *Improving Commission Processes*, PP Docket No. 96-17, *Notice of Inquiry*, 11 FCC Rcd 14006 (1996).

and regulations or prevent unreasonable discrimination. Thus, forbearing from enforcing §214 will not adversely affect the Commission's ability to regulate carriers' unreasonable behavior.[15]

The Commission is correct that the second prong of the forbearance test is met -- enforcement is not necessary to protect consumers. Price cap regulation and competitive forces will constrain the prices and practices of the subject carriers for the protection of consumers.

Forbearance is also in the public interest, the third prong of the §10(a) test. Without prior authorization requirements, carriers will be able to introduce services to consumers without unnecessary regulatory delay; administrative expenses for new products will be reduced; and competition will be promoted by eliminating the opportunity for headstarts by competitors.

B. Streamlining is Not a Legal Alternative for Companies That Lack Incentives to Overinvest in Facilities

The Commission proposes streamlined regulation for rate of return companies. Streamlining would reduce the amount of information a carrier must file with its §214 application and establish a timeline for Commission approval of the application. The Commission asks if these streamlined §214 requirements should apply, instead of forbearance, to price cap companies, average schedule companies and domestic, non-dominant carriers.

The Commission would violate §10(a) if it failed to forbear from enforcing regulations when the forbearance tests are met. The requirement to forbear is not discretionary. Section 10(a) *directs* the Commission to forbear from enforcing a regulation when the statutory conditions are met. The Commission's analysis shows that forbearance is appropriate. For the

[15] Complaint actions can be brought under Section 202. NPRM, para. 43, n. 75.

Commission to substitute streamlining for forbearance would absolutely undercut Congress' deregulatory intent and violate §10(a).

Adopting streamlining instead of forbearance for carriers that do not have incentives to build unnecessary facilities would be contrary to the pro-competitive goals of the 1996 Act. Streamlining does nothing to eliminate the anti-competitive effects of regulating only some competitors. Carriers subject to streamlining would continue to be unnecessarily burdened, even if their burden is minimally reduced by the proposed streamlining.

Finally, there is no public interest in applying regulations which do not advance the goal of §214 -- preventing unnecessary investment to the detriment of ratepayers, even if the regulation is streamlined. Rates of price cap companies are capped. New investment, whether necessary or not, is not recoverable through rates and thus investment cannot increase prices to captive ratepayers. Non-dominant carriers costs are constrained by competition in the market.

The Commission asks for comment on procedures that may be necessary if a carrier's forbearance-eligible status changes as a result of a change in its ratemaking method or market status. NPRM, para. 49. The chances of these circumstances occurring are slim, at best. There is little likelihood that carriers will go from price cap regulation to rate of return regulation or that market conditions will become less competitive. Regulators are committed to increasing competition. There is no question that they are succeeding. Similarly, the Commission asks how a carrier that is dominant in some markets but non-dominant in others should be treated. The answer is simple: the carrier should be required to follow the regulation appropriate to its status. Dominance is not relevant for price cap carriers or average schedule companies. If a carrier's ratemaking method changes, the carrier should be subject to §214 regulation that is appropriate to its new status unless it can convince the Commission that such change is not in the public interest.

IV. The Commission Should Streamline Its Discontinuance Process

The Commission proposes to extend the streamlined discontinuance procedures now available only to non-dominant carriers to all domestic carriers. The Commission suggests that streamlining would help eliminate any unnecessary barriers to exit which may discourage entry. Streamlining would thus further the 1996 Act's goal to promote competition. NPRM, para. 70.

The current streamlined discontinuance procedure requires a non-dominant carrier to file an application that requires limited information describing the proposed change, effective date, affected service area, and the dates and method used to notify all affected customers in writing. The application is automatically granted on the thirty-first day after filing, unless the Commission notifies the carrier otherwise.[16]

We support any efforts to reduce regulation especially those that do not apply to our competitors and urge the Commission to adopt its proposal. Extending streamlined discontinuance procedures to dominant carriers would reduce carriers' regulatory burden while continuing to protect consumers. The streamlined discontinuance rules continue to require carriers to provide notice of service reductions or discontinuance which gives consumers the opportunity to show why the public interest would be harmed if the Commission permitted the discontinuance or service reduction.

[16] 47 C.F.R. §63.71.

As additional protection in streamlining the process for dominant carriers, the Commission proposes to extend the required advance notice period from 30 days to 60 days. This longer notice period will provide greater consumer protection while continuing to afford carriers some regulatory relief. The 1996 Act also protects consumers' service needs by permitting the Commission, with respect to interstate services, or a state commission, with respect to intrastate services, to order a common carrier or carriers to provide service to an unserved community that requests service.[17]

V. Conclusion

We support the Commission conclusions in this proceeding because they are consistent with Congress' intentions. The proposals eliminate unnecessary regulation and promotes competition. For the reasons discussed above, the Commission should adopt its

[17] Section 102(a) of the 1996 Act (codified as §214(e)).

tentative conclusions and our recommendations for broadening the definition of "extension" to include increases in network capability.

Respectfully submitted,

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